IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

Supreme Court, U.S.
FILED
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No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated With

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vs.

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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National Bank of Albany Park in Chicago, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee

under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered December 2, 1970, denying petitioners leave to appeal from the final judgment of the Appellate Court, First District, entered in this case on June 15, 1970, affirming a trial court judgment entered February 11, 1969.

OPINIONS BELOW.

This case has appeared in reports twice. The first opinion is that of the Illinois Appellate Court, First District, in case No. 51710, reported in 95 Ill. App. 2nd 258; 238 N. E. 2nd 434 (April 1968) (App. A2). The second opinion is also that of the Illinois Appellate Court, First District, in case No. 54685, reported in 127 Ill. App. 2nd 51; 261 N. E. 2nd 711 (Jun. 1970) (App. A7).

JUDGMENT BELOW.

June 15, 1970, the Appellate Court of Illinois, First District, entered its judgment in this cause affirming the *nisi prius* court (the Circuit Court of Cook County, Illinois) judgment order entered February 11, 1969, on a jury verdict (App. A33). A petition for rehearing was filed in the Appellate Court of Illinois July 6, 1970, and denied on August 3, 1970.

A petition for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court, First District, was denied December 2, 1970. A limited motion for reconsideration by the Illinois Supreme Court of its order denying petition for leave to appeal was denied January 26, 1971.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Sect. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a defendant-landowner who has attempted to show that a public body has abused its discretion in an eminent domain case is deprived of due process of law when he is prevented from presenting issues and evidence in support thereof notwithstanding remandment from an Appellate Court for the purpose of holding such hearing?

2. Whether a defendant-landowner in an eminent domain case has been deprived of just compensation within the meaning of the Fourteenth Amendment when he is prevented by court order from the right to present the issue of severance damages to a jury arising from the fact that he is possessed and owner of a larger tract than is described in the condemnation complaint?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fourteenth Amendment, United States Constitution.

2. Article 2, Section 2, Bill of Rights, of the Constitution of Illinois:

> "No person shall be deprived of life, liberty or property, without due process of law."

3. Article 2, Section 13, Bill of Rights, of the Constitution of Illinois:

> "Private property shall not be taken or damaged for public use without just compensation. Such compensa-

tion, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."

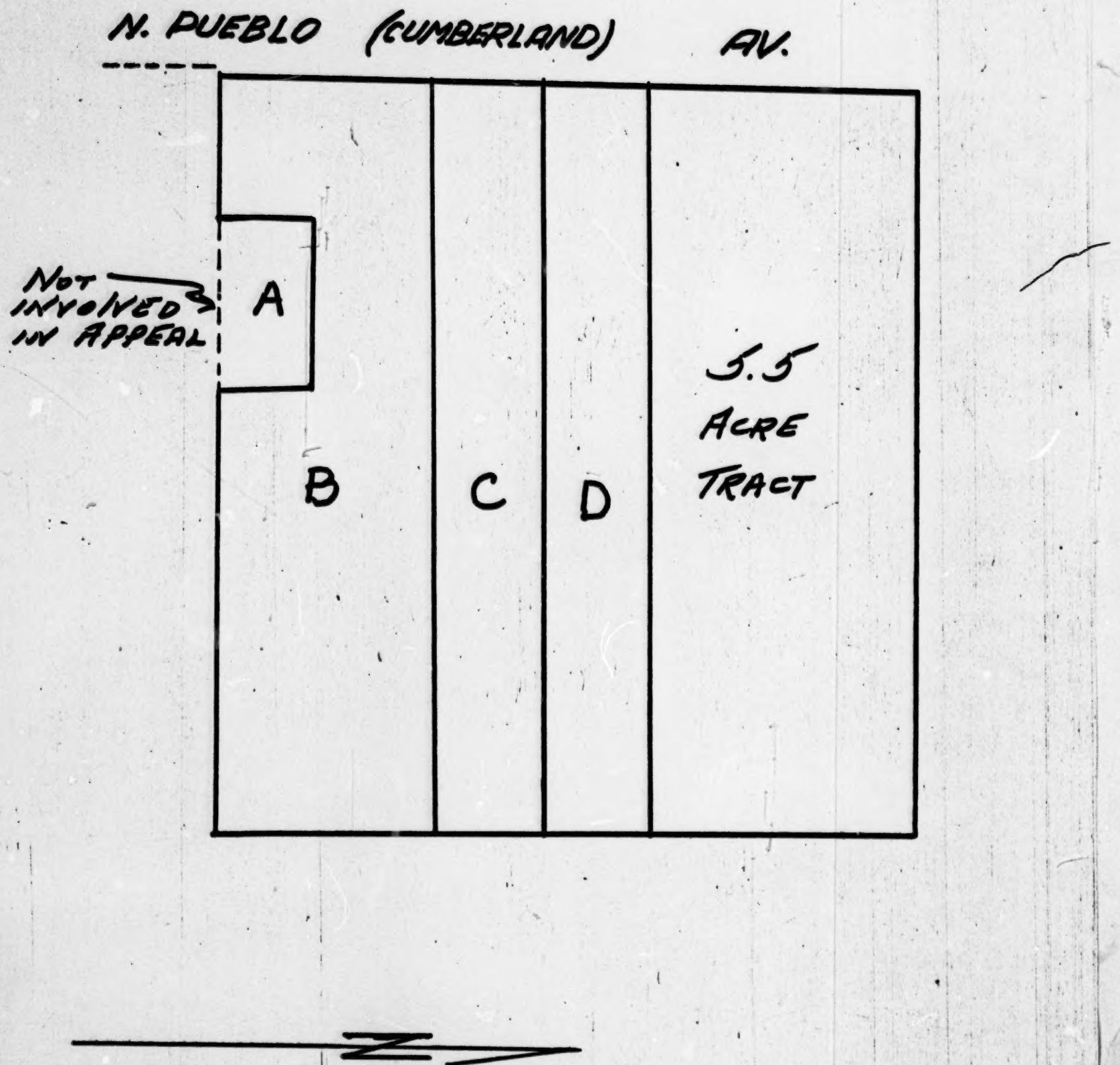
4. The Eminent Domain Act of Illinois (Chapt. 47 State Bar Association Edition, 1965) Sections 1, 2, and 11. Set forth in Appendix in full. No terms thereof are in question but Sections 1 and 2 repeat the constitutional provision against damaging property without compensation (App. A29).

5. The School Code of Illinois (Chapt. 122, State Bar Association 1965 Edition) Sections 34-1, 34-2, and 34-20. Set forth in Appendix only to show plaintiff's status (App. A31).

STATEMENT OF THE CASE.

This is an Eminent Domain proceedings commenced in March, 1965, by the Board of Education of the City of Chicago (herein called Board) to acquire Parcels B, C, and D, which consist of approximately ten acres of vacant land, in the far northwest corner of the City of Chicago. There is no place for further expansion of the city; to the north is the Kennedy Expressway and the City of Park Ridge. To the west is an extensive forest preserve. To the south the city adjoins the Village of Norridge. Cumberland Avenue (also known as Pueblo), is the major north-south street in the area and, at its juncture with the Kennedy Expressway 1 block away, there is a full four-way cloverleaf, the last major access prior to entering O'Hare International Airport. The location of the parcels in the case and the contiguous 5.5 acre tract petitioners owned are shown on the attached sketch.

The owner and record title holder of Parcel B is La Salle


N. PUEBLO (CUMBERLAND) AV.
NOT INVOLVED IN APPEAL
A
B
C
D
5.5 ACRE TRACT
N

National Bank of Chicago as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, who sold to the trustee during the pendency of the case.

The owner and record title holder of Parcel C and the 5.5 acre tract immediately north at all times pertinent has been National Bank of Albany Park in Chicago as Trustee under Trust No. 11-1030.

The record legal title to Parcel D at the beginning of the suit was in Exchange National Bank of Chicago as Trustee under Trust No. 15166, subject to a contract of sale (App. A40). Possession, the right to subdivide, to dedicate streets, to grant easements, etc. under the terms of that contract were in the contract purchaser, the identical person who was the beneficiary and equitable owner under both the National Bank Trust and the LaSalle Trust.

The Board had taken an appeal from a prior trial, held March, 1966, contending the verdicts were excessive and the results of passion and prejudice. Petitioners had cross-appealed contending they were denied due process in the trial court's refusal to entertain motions to dismiss. Petitioners also had sought leave to have damages assessed to a remaining contiguous parcel they owned upon the trial, which leave was denied by the trial court; the Appellate Court did not reach this issue. The Appellate Court of Illinois in case No. 51710 (App. A2) reversed judgment in favor of the Board and remanded the cause, upholding petitioners' cross-appeal. The opinion of that Court said:

> "We believe that defendants were entitled to a hearing on the petitioner's (the Board's) right to condemn." (App. A5.)

On remand, over objection of the Board, petitioners filed amended motions to dismiss Parcels C and D and a Motion to Dismiss as to Parcel B (all identical) (One is set

forth in full in the App., p. A32). The Board then filed a motion to strike the Motions to Dismiss as legally insufficient. Despite the Appellate Court opinion, the court struck paragraphs 1, 3, 4, and 5 of petitioners' motions and denied leave to amend.

The following court day, the court heard evidence on the one remaining paragraph of the Motions to Dismiss. The Board introduced its resolutions authorizing the taking, containing the language "it is necessary and desirable to acquire the said real estate for school purposes". The Board offered no other evidence and no other evidence was required of it by the trial court.

Petitioners then introduced evidence that the Board, after beginning and abandoning two prior cases (one of 2.9 acres) condemning property in the immediate vicinity, changed the size of this site from 7.92 to 12.8 to 10.5 acres on at least five occasions in this instant suit. The Board also had pending a proceeding to acquire a site approximately four blocks away of 3.5 acres, which would provide school facilities for all children in the area in kindergarten through eighth grade and such school is presently under construction.

Upon conclusion of petitioners' evidence, the trial judge asked "what if they (the Board of Education) learned they made a mistake"? Without requiring any evidence or argument from the Board it overruled and denied the Motions to Dismiss.

The trial court, on its own motion, then ordered any and all petitions or motions to be presented solely upon leave of court first obtained within ten days. Petitioner National Bank of Albany Park, owner of Parcel C, and substituted for the original defendant to Parcel D, asked leave to file a cross-petition for damages to the 5.5 acre remaining tract immediately north of and contiguous to Parcel D in these

proceedings. The trial judge ruled that the contract (App. A40) under which petitioner had acquired Parcel C in two steps prior to the filing of this case, was in possession and collecting rents on both C and D and had also acquired record title to Parcel D after the filing of this case was an "option". He denied leave to file the cross-petition. The Appellate Court of Illinois, First District, affirmed this ruling, in case No. 54685 (App. A22).

MANNER IN WHICH FEDERAL QUESTION RAISED AND DISPOSED OF.

The first reference by petitioners that they were deprived of due process is contained in the Motions to Dismiss and Amended Motions to Dismiss (all identical, App. A32) filed in the trial court on behalf of all petitioners here (R. 35). The Motions to Dismiss were disposed of by order of court January 3, 1969, striking paragraphs 1, 3, 4, and 5 (R. 155), which order denied leave to amend, and by order of court January 6, 1969, denying and overruling the remainder (R. 161). Leave was sought to file these petitioners' cross-petition for damage to the remaining 5.5 acre contiguous tract January 10, 1969 (R. 178), and was denied that day.

In petitioners' post-trial motion, they claimed it was error to require petitioners to proceed to trial without allowing severance damages to contiguous property to be assessed (R. 213). March 10, 1969, the trial court denied this. Petitioners' Notice of Appeal (R. 237) from the final determination of the Circuit Court of Cook County to the Appellate Court of Illinois, First District, was filed April 11, 1969. Please note paragraphs a) and d) of the prayer thereof (App. A38-9).

This appeal was allowed as a matter of right but denial in the trial court of due process was not specifically con-

sidered or passed on by the Appellate Court of Illinois, First District. In case No. 54685 leave to appeal to the Supreme Court of Illinois was denied on December 2, 1970.

REASONS IN SUPPORT OF PETITION.

A. Concurrently with the expansion of population there has been an expansion of the services which people expect from their government. To provide such services, public agencies have been granted the right to acquire or dispose of real property so as to carry out their purposes. That this will lead to geater frequency of the taking of private property by public bodies would seem to follow. Likewise, it should follow that more frequently will defendants seek to contest such taking.

The rule in Illinois historically has been that questions as to the sufficiency of an eminent domain proceedings or the authority of a plaintiff to condemn must be raised by motion to dismiss filed prior to impaneling of a jury. When such motion is filed the burden of proof is upon the taking body to make a prima facie proof of the disputed averments, *U. S.* v. *Nudelman,* 104 Fed. 2d 549, 551; *Board of Trustees of Southern Illinois University* v. *Lange,* 28 Ill. 2d 229, 190 N. E. 2d 789, 790; *Board of Education* v. *City of Chicago,* 402 Ill. 291, 83 N. E. 2d 714, 718. The latter case holds it is a matter of right of a defendant to contest a complaint to condemn, as did the first opinion in this case.

The Appellate Court established as the law of this case that petitioners were entitled to a hearing. Despite this, four out of five paragraphs of the petitioners' motions to dismiss were stricken; the trial court and later the Appellate Court apparently accepting the misinterpretation thereof placed on them by the Board whose decision was being questioned. Paragraphs 1 and 3 of those motions, taken together, state that the Board had not decided on what

type of a school it might build and had had no reports, surveys or other basis or reason why it should proceed. Those stricken allegations should be considered true for these purposes, and petitioners contend that this establishes a complete abuse of discretion by the Board.

It beggars common sense to label as a hearing the trial court's peremptory dismissal of the Board's many changes of site without the Board proffering any reason therefor. No burden of proof was placed upon the Board and no proof at all required. The Board cannot contend that it made an effort to arrive at a fair and reasoned conclusion before choosing as in *United States* v. *Carmack*, 329 U. S. 230, 243-45, 91 L. Ed. 209, 67 S. C. 252. It has tried at all stages herein to have its burden carried solely by its allegation the land is necessary for school purposes contained in its resolution. Petitioners' position regarding this "administrative decision and lack of review thereof" is set forth in a quotation from Mr. Chief Justice Traynor of the California Supreme Court, 17 Vanderbilt Law Review 109, 117:

> "A person has not had a fair hearing if the one in authority, given discretion to adjudge the case in the ample terms of a general policy, has exercised his discretionary power not with the realistic appropriateness that is the very justification of such power, but with such harsh inappropriateness as to mock the meaning of discretion. A court reviewing an alleged abuse of discretion, and finding a prima facie case of arbitrariness, must be alert to ascertain whether or not there emerges from the record some reasonable explanation for the administrative decision. We cannot take it for granted that because an authority is, he thinks. The thought process, or the absence thereof, of the one in authority has more than once been the key to determining the issue of due process in administrative proceedings."

This record is devoid of any reasons for the Board's actions. It further lacks any showing that those decisions it made were peculiarly within the Board's expertise. Petitioner's motion to dismiss at least challenged the Board to establish some reasonable basis for its actions. None was forthcoming; none was required of the Board by the Illinois courts which never received any "key to determine the issue of due process."

The procedure of a motion to dismiss or traverse to contest an eminent domain proceedings has not been changed in any way by the Illinois Legislature. Yet this case results in the law now preventing a landowner from questioning whether a public body has abused the power of eminent domain except in the rare instance where a technical defect has occurred in the adoption of a resolution or ordinance. If the law has not thus been changed then this is the first Illinois case in which a motion to dismiss or traverse was held legally insufficient to raise an issue.

B. No constitutional provision, Federal or Illinois, limits compensation for condemning property for a public use to the taking of only record legal title, yet this is the effect of the decisions in this case of the Illinois Courts. The reason assigned by the trial court and the Appellate Court for denying petitioners severance damages was that the November 1962 installment purchase agreement was an option because it had a liquidated damages clause in it; as though any agreement of any kind or nature which has a liquidated damages clause in it is therefore only an option. The Board did not question the fact that petitioners were in possession and using the premises (Parcels C, D, and the 5.5 acres) as a tract, but the Court failed to give any consideration to this unified equitable ownership. Petitioner National Bank of Albany Park, as Trustee, at the very inception of the lawsuit and at all times pertinent,

including the present, has had all of the bundle of rights including full record legal title to the 5.5 acre tract and to Parcel C, and was purchasing Parcel D under the installment sales agreement. Subsequent to initiation of this suit petitioner completed the payments required under the agreement and acquired record legal title to Parcel D (the only right in the bundle petitioner could not have acquired at the time the case began).

Since a portion of the tract has been taken, under the constitutional provisions petitioner should have been entitled to have severance damages assessed to the remainder. They were denied that right. This is not in accord with what the Fourteenth Amendment to the Constitution provides and has been interpreted to mean. *U. S.* v. *Miller,* 317 U. S. 369 at 376, 87 L. Ed. 336, 63 S. C. 276, citing Lewis, Eminent Domain, Third Edition 686; Nichols, Eminent Domain, Second Edition, Section 236; *U. S.* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787, 30 S. C. 527, and *U. S.* v. *Grizzard,* 219 U. S. 180, 55 L. Ed. 165, 31 S. C. 162. Article 2, Section 2 and Article 2, Section 13 of the Illinois Constitution must be interpreted in the same way. Also to the same effect is this court's statement in *U. S.* v. *Dickinson,* 331 U. S. 745 at 750, 91 L. Ed. 1789, 67 S. C. 1382, where the court said:

> "When a part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account." Quoting Bauman v. Ross, 167 U. S. 548 at 574 with approval.

The closing words of *U. S.* v. *Grizzard* are particularly apropos, 219 U. S. 180, commencing at 185 where this court says:

> "To say that an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation

> to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice."

The issue is not whether a landowner of property in a condemnation is entitled to severance damages on contiguous property on which he only has an option. The issue is whether or not there were sufficient incidents of ownership of the whole tract so that upon the taking of portions thereof, such as Parcels C and D, defendants were entitled to severance damages to the remainder. They were not permitted to make such an issue.

Your petitioners attempted at all times to preserve their rights following the procedure long established in Illinois. This procedure is set forth in the case of *Johnson et al.* v. *F. & M. R. Ry. Co.*, 111 Ill. 413 (1884) at pages 416-17. The substance of this opinion is that a party, by implication of Sec. 11 of the Illinois Eminent Domain Act, has the right where his interests are not fully set forth in the condemnation complaint, to cross-petition for damages so that the constitutional guarantee is afforded. Petitioners were prevented from having a jury assess severance damages when leave to file their cross-petition was denied. If Section 11 of the Illinois Eminent Domain Act is construed so as not to protect petitioners right to severance damage under the Fourteenth Amendment, then Sec. 11 is unconstitutional.

The Illinois Appellate Court is totally wrong in calling the agreement of November 20, 1962, an option agreement. An option is the right to decide some time in the future whether or not you will purchase property. The November 1962 contract was an agreement for the sale and purchase of real estate with payments to be made in installments; the recitals therein confirm this. The execution by the sellers of an irrevocable letter of direction to convey given

to the land trust holding title to the property would otherwise be absolutely meaningless. Additionally, the opinion of the Appellate Court conflicts with the decision of the court in *Shay* v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218 at 219, where it is decided a similar liquidated damages clause in a sale-purchase agreement does not prevent equitable conversion. Bear in mind that legal title to Parcel C had already been conveyed under that same agreement.

The condemnation of the land under the right of eminent domain is, in fact, for the purposes of the present question, a sale of it. *Stevenson* v. *Loehr,* 57 Ill. 509 (1871). *City of Chicago in Trust for Schools* v. *Robertson,* 48 Ill. App. 2d 241, 198 N. E. 2d 192 (1964). Only petitioners under the terms of the November 1962 agreement, had the right to sell since the vendors in that agreement had irrevocably parted with any control over any part of the property, including record title thereto. As was said in *State Highway Commission* v. *Miller* (Sup. Ct. of S. Dak.), 155 N. W. 2d 780 (1968) at 782-3:

> "Wolfe v. Iowa Ry. & Light Co., 178 Iowa 1, 155 N. W. 324, determined a vendee in contract for deed was a proper party to a condemnation proceeding. After describing the relationship of the parties to the contract in terms similar to that stated in Renner v. Crisman, supra, the court said:
>
> > 'In the case before us, it is not very material whether we call the Wolfes the equitable owners of the land or whether we characterize their interest by some other term. They did have a fixed and vested interest in the real estate * * *'.
>
> "In Pierce County v. King, 47 Wash. 2d 328, 287 P. 2d 316, the court wrote:
>
> > 'We hold that, under the above statute (providing necessary parties in a condemnation proceeding), a vendee in possession under an executory con-

> tract is included within the meaning of terms, "other person or party interested," and is a necessary and proper party to condemnation proceedings.'
>
> "Similarly in another condemnation proceeding, Commonwealth, Dept. of Highways v. Devillez, Ky., 400 S. W. 2d 520, considered the status of the vendees in a contract for deed and concluded they 'had such an equitable and beneficial interest in this property as to be properly treated as the owners thereof.' State v. Bradshaw Land & Livestock Co., 99 Mont. 95, 43 P. 2d 674, appears to be in accord."

We respectfully suggest to the court that even if the November 1962 agreement be considered an option, the law in Illinois requires that it be considered exercised for purposes of eminent domain valuation. The case of *Department of Public Works* v. *Bohne,* 415 Ill. 253, 113 N. E. 2d 319, involved the valuation of a leasehold for ten years with an option to renew in lessee for another 10 year term. The court held that the owner of this leasehold interest was entitled to be awarded compensation for such interest (which obviously could be lost if installment payments of rent were not made). The court said (p. 324 of 113 N. E. 2d):

> "That market value was enhanced by the option to renew, which, in effect, extended the lease to a term of 20 years, * * * (citations), and by the permanent improvements, notwithstanding the fact that they would revert to the lessor on termination of the lease. (Citations.)"

The Illinois courts thus value for eminent domain purposes other interests than full fee title interest. The above case involved a leasehold which is only a chattel real but still an interest in land. The *People* v. *Shedd,* 217 U. S. 597, 54 L. Ed. 896, 30 S. C. 696, affirming 241 Illinois 155, 165 (1909). Those same Illinois courts have gone quite far in allowing severance damages as shown by *Department*

of Public Works v. *Diel,* 89 Ill. App. 2d 130, 232 N. E. 2d 133. *Chicago and Evanston RR* v. *Dresil,* 110 Ill. 89 (1884) and the unusual case of *Chicago Santa Fe Ry.* v. *Ward* (1889), 128 Ill. 349 where a mere right to use while having personal property on the condemnor's land makes the defendant an "owner" or "interested in" so as to be awarded severance damages when his adjoining land is taken.

If, as shown, such interests are entitled to compensation when taken for a public use, they should be held sufficient interest when taken to claim severance damages to contiguous property completely owned but not taken. This right to such severance damages for the 5.5 acre tract was completely denied petitioners.

This court has already held in re-examining the final judgment of the Supreme Court of Illinois in an eminent domain case, that the State's judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment (the Fourteenth Amendment). *Chicago Burlington & Quincy R. R.* v. *City of Chicago,* 166 U. S. 226, 234-5, 41 L. Ed. 979, 17 S. C. 581. In this case your petitioners claim they were not given the fullest opportunity to be heard, and thus due process was violated. This court has further stated in the same case at page 241:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

This court further said, at page 246:

> "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

Petitioners here contend the trial court and the Appellate Court of Illinois not only prevented the jury from determining severance damages but also denied petitioners right to any compensation for property damaged.

CONCLUSION.

Due protection of the rights of property has been regarded as a vital principle of republican institutions said Mr. Justice Harlan in the same case (P. 235), in 1896. Petitioners believe they have shown a complete deprivation of due process by the courts of Illinois in defiance of Illinois' own law and constitution, while at all times Petitioners have attempted to assert and protect those rights. They respectfully pray the issuance of a Writ of Certiorari to the Supreme Court of Illinois in the circumstances of this case.

Respectfully submitted,

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